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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Dominion Nuclear Connecticut, Inc.	)	Docket Nos. 50-336 - LR
	)	50-423 - LR
(Millstone Nuclear Power Station,	)	
Units 2 and 3)	)	
	)	

DOMINION NUCLEAR CONNECTICUT'S BRIEF IN OPPOSITION TO THE APPEALS OF CONNECTICUT COALITION AGAINST MILLSTONE

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Pursuant to 10 C.F.R. § 2.311(a), Dominion Nuclear Connecticut, Inc. ("DNC" or "Dominion") submits this brief in opposition to two appeals filed by the Connecticut Coalition Against Millstone ("CCAM") in the Millstone license renewal proceeding. CCAM's first Notice of Appeal[1] seeks review of an Atomic Safety and Licensing Board ("Board") memorandum and order[2] denying CCAM's Petition to Intervene and Request for Hearing.[3] The Board properly denied CCAM's Petition because none of its proffered contentions satisfied the requirements of 10 C.F.R. § 2.309(f)(1), and all were therefore inadmissible.[4] CCAM's second Notice of Appeal[5]

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[1] Undated Notice of Appeal (hereinafter referred to as the "First Appeal"). The accompanying "Certification" by CCAM's Counsel states that the "Petition for Review" was mailed on "July 9, 2004." The "Notice of Appeal" was in fact served on August 9, 2004, when it was electronically delivered to the parties and placed in the mail.

[2] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), Memorandum and Order (Ruling on Standing and Contentions), LBP-04-15, 60 N.R.C. __, slip op. (July 28, 2004) ("LBP-04-15").

[3] "Petition to Intervene and Request for Hearing" ("Petition"), dated February 12, 2004. The Petition was re-filed by CCAM via electronic mail on March 22, 2004, unchanged from the February 12 version, unsigned, and not accompanied by a certificate of service.

[4] LBP-04-15 at 18.

[5] Notice of Appeal (Sep. 30, 2004) (hereinafter referred to as the "Second Appeal"). The Second Appeal was accompanied by a Memorandum in Support of Notice of Appeal (Sept. 30, 2004).

seeks review of a subsequent memorandum and order[6] by the Board denying CCAM's motion for reconsideration and request for leave to amend its petition.[7] The Board properly denied CCAM's motion because CCAM failed to address any of the standards for reconsideration, or for amending contentions.[8]

The Commission should affirm the Board's decisions because (1) CCAM has failed to identify any error of fact or law in those decisions, and has not charged the Board with any procedural errors that might warrant Commission review; (2) the Board's decisions are clearly correct; and (3) CCAM's continual failure to meet its obligations under the NRC rules warrants its dismissal. In essence, this proceeding involves a petitioner that has had six opportunities (its initial petition, an amended petition, a supplement to its petition, a reply, argument at a prehearing conference, and a motion for reconsideration and leave to amend petition) to establish an admissible contention, but has repeatedly failed to comply with the Commission's procedural standards and requirements. Accordingly, CCAM's appeals should be denied.

STATEMENT OF THE CASE

On January 20, 2004, DNC applied, pursuant to sections 104b and 103 of the Atomic Energy Act of 1954, as amended ("AEA") and 10 C.F.R. Part 54, to renew the operating licenses for Millstone Power Station, Units 2 and 3 ("the Millstone Units") for an additional 20-year period beyond their current expiration dates ("License Renewal Applications"). On February 3, 2004, the NRC published a notice in the Federal Register advising the public of the receipt of

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[6] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), Memorandum and Order (Denying Motion for Reconsideration and Request for Leave to Amend Petition), LBP-04-22, 60 N.R.C. __, slip op. (Sept. 20, 2004) ("LBP-04-22").

[7] Connecticut Coalition Against Millstone Motion for Reconsideration and Request for Leave to Amend Petition (Aug. 9, 2004).

[8] LBP-04-22 at 6.

DNC's applications.[9] On February 12, 2004, before completion of the NRC's sufficiency review and docketing of Dominion's applications, and before any notice of opportunity to request a hearing was published, CCAM prematurely filed its Petition. On March 1, 2004, CCAM wrote a letter to the Secretary asserting that because CCAM had filed its Petition prior to the effective date (February 13, 2004) of the recent revisions to 10 C.F.R. Part 2,[10] the "Coalition Petition proceedings must be conducted pursuant to the 'old' 10 CFR Part 2 rules."[11] On March 4, 2004, the NRC Secretary returned the Petition to CCAM because it was premature.

A notice of the acceptance of DNC's applications for docketing was subsequently issued and was published in the Federal Register on March 12, 2004.[12] The Notice of Acceptance stated that the NRC Staff had determined that DNC "has submitted sufficient information . . . that is acceptable for docketing" and gave notice that "[w]ithin 60 days after the date of publication of this Federal Register Notice . . . any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the licenses."[13] Thus, under the terms of the Notice of Acceptance, CCAM had sixty days from March 12 – that is, until May 11 –

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[9] "Dominion Nuclear Connecticut, Inc., Notice of Receipt and Availability of Application for Renewal of Millstone Power Station, Units 2 and 3 Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period" ("Notice of Receipt"), 69 Fed. Reg. 5,197 (Feb. 3, 2004). The Notice of Receipt advised that "[t]he acceptability of the tendered application for docketing, and other matters including the opportunity to request a hearing, will be the subject of subsequent Federal Register notices." *Id.*

[10] "Changes to Adjudicatory Process, Final Rule," 69 Fed. Reg. 2,182 (Jan. 14, 2004).

[11] Letter from N. Burton to NRC Secretary (Mar. 1, 2004) at 2.

[12] "Dominion Nuclear Connecticut, Inc., Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period" ("Notice of Acceptance"), 69 Fed. Reg. 11,897 (Mar. 12, 2004).

[13] *Id.*

to formulate a petition to intervene and assemble any pertinent supporting documentation. The Notice also directed any person requesting a hearing to set forth with particularity the interest of the petitioners in the proceeding and how that interest may be affected, and also, consistent with the new Part 2 rules, to "set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding."[14]

CCAM did not take advantage of the considerable time allowed by the Notice of Acceptance. Instead, as noted above, on March 22, 2004, CCAM re-submitted unchanged the Petition that it had first filed on February 12, making no attempt to provide additional support or bases for its proposed contentions, nor to conform its filing to the new Part 2 rules.[15] CCAM's Petition, as filed on February 12 and as re-filed on March 22, did not contain a single reference to any portion of Dominion's applications alleged to be inadequate (indeed, the Petition gave no indication that CCAM had ever read the applications). Nor did the Petition identify a single document or expert opinion in support of any of its proposed contentions.

Also on March 22, 2004, CCAM filed a "Motion to Vacate NRC Secretary Determination of Petition Prematurity and to Accept Petition to Intervene and Request for Hearing As of Date of Filing and to Apply 'Old' CFR Rules to Said Petition" ("CCAM's Motion to Vacate"). On March 25, 2004, the Commission referred the Petition to the Board, while retaining jurisdiction over CCAM's Motion to Vacate.

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[14] *Id.* at 11,898.

[15] In this regard, the Petition stated that CCAM would elaborate upon the basis for its Petition in a formal submission of contentions, and reserved the right to expand upon and supplement the contentions. Petition at 2. Under the new rules, an intervention petition must include a specification of the contentions which the person seeks to have litigated in the hearing, and amended or new contentions may only be filed after the initial filing with the leave of the Presiding Officer upon a showing addressing the factors in 10 C.F.R. § 2.309(f)(2)(i)-(iii). 10 C.F.R. §§ 2.309(a), (f)(2).

On April 2, 2004, Dominion and the NRC Staff responded to and opposed CCAM's Motion to Vacate.[16] In addition, by letter that same day, Dominion informed the Chief Administrative Judge of the Atomic Safety and Licensing Board that Dominion intended, unless otherwise directed by the Board, to defer any answer to CCAM's Petition until one conforming to the new Part 2 rules (i.e., a petition not dependent on further supplementation) was submitted.[17] Neither CCAM nor the NRC Staff objected to this approach, and CCAM consented to a motion by the NRC Staff to extend the time for the NRC's response to the Petition to twenty-five days after the close of the intervention period.[18]

On May 4, 2004, the Commission denied CCAM's Motion to Vacate.[19] The Commission held that the new Part 2 applies to all proceedings noticed on or after February 12, 2004, and inasmuch as this proceeding was noticed after that date, the new Part 2 Rules apply to it.[20] CCAM submitted a Motion for Reconsideration of the Commission's decision on May 14, 2004, essentially repeating its previously rejected arguments. The Commission denied the motion in an unpublished Order dated May 18, 2004.

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[16] Dominion's Answer to CCAM's Motion to Vacate Secretary's Determination (Apr. 2, 2004); NRC Staff's Response to Connecticut Coalition Against Millstone's Motion to Vacate and to Accept Petition to Intervene and Request for Hearing (Apr. 2, 2004).

[17] Letter from D. Lewis to Judge G. Paul Bollwerk (Apr. 2, 2004). This letter was necessitated by a statement in the Petition that "CCAM will elaborate upon the basis for this petition in its formal submittal of contentions" (Petition at 2), implying – contrary to the new Part 2 rules of practice – that the matters set forth in the Petition did not represent CCAM's formal contentions, and that those would be filed at a later time. Dominion stated that if CCAM made no further filings by the May 11, 2004 deadline for filing petitions to intervene, Dominion would submit its answer within 25 days of the close of the period for intervention.

[18] NRC Staff's Unopposed Motion for an Extension of Time to Respond to Connecticut Coalition Against Millstone's Petition to Intervene and Request for Hearing (Apr. 1, 2004). The Chief Administrative Judge granted this motion by Order dated April 5, 2004.

[19] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 N.R.C. 237 (2004) ("CLI-04-12").

[20] *Id.* at 240.

The Board for this proceeding was appointed on May 19, 2004.[21] When CCAM made no further filings by the May 11, 2004 deadline, Dominion and the NRC Staff filed answers opposing CCAM's petition to intervene on June 7, 2004.[22] Both answers argued that CCAM had failed to demonstrate standing or proffer any admissible contentions.

On June 8, 2004, the Board issued an order scheduling a prehearing conference to address the issues raised by the various filings of the parties.[23] In the June 8 Order, the Board among other things provided specific instructions for filing motions for extension of time, requiring that such motions be filed three business days prior to the due date of the pleading and "demonstrate appropriate cause that supports permitting the extension."[24]

On June 14, 2004, CCAM submitted an amended petition accompanied by three new declarations.[25] CCAM demonstrated no cause for this late amendment and did not address, as required by 10 C.F.R. § 2.309(c)(2), any of the factors set forth in the Commission regulations in 10 C.F.R. § 2.309(c)(1) for untimely petitions.[26] Two days later, CCAM filed a late motion for

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[21] *See* 69 Fed. Reg. 29,759 (May 25, 2004).

[22] "Dominion's Answer to CCAM's Petition To Intervene and Request For Hearing" (June 7, 2004); "NRC Staff Answer To Petition To Intervene And Request For Hearing Of Connecticut Coalition Against Millstone" (June 7, 2004).

[23] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), unpublished Order (June 8, 2004) ("June 8 Order").

[24] June 8 Order at 4.

[25] "[CCAM] Amended Petition To Intervene And Request For Hearing" (June 14, 2004) ("Amended Petition").

[26] CCAM merely asserted that "[s]uch documents are submitted in response to objections raised by licensee and NRC staff to CCAM's initial ruling." "[CCAM] Motion For Leave To File Amended Petition To Intervene And Request For Hearing" (June 14, 2004).

leave to reply to the Dominion and NRC Staff answers[27] and an equally belated reply to the answers to its Petition filed by Dominion and the NRC Staff.[28]

On June 27, 2004, the Sunday before the prehearing conference, CCAM submitted a motion for stay of the proceeding, pending the outcome of a June 25, 2004 CCAM petition for review of the Commission's CLI-04-12 decision by the U. S. Court of Appeals for the Second Circuit.[29] Two days later, on June 29, 2004 – the eve of the prehearing conference – CCAM submitted a motion for leave to supplement its petition to intervene with another declaration. This motion was sent by electronic mail at 5:30 PM on June 29 and was hand-delivered at the prehearing conference the following day. CCAM also hand-delivered at the prehearing conference a document styled "Second Motion For Stay Of Proceedings," which requested a stay of the Board proceedings based on an expression of interest by the County of Suffolk, New York, in this proceeding.

The Board conducted its prehearing conference with CCAM, Dominion, and the NRC Staff in New London, Connecticut, on June 30, 2004.[30] At the beginning of the conference, the Board heard oral argument on the June 27 and June 30, 2004 CCAM stay motions and denied those motions to the extent they applied to the prehearing conference.[31] The balance of the

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[27] "[CCAM] Motion For Leave To File Reply To Licensee and NRC Staff Answers To Petition, Amended Petition and Declarations of CCAM Members *Nunc Pro Tunc*" (June 16, 2004).

[28] "[CCAM] Reply To Licensee And NRC Staff Answers To Petition" (June 16, 2004).

[29] "[CCAM] Motion For Stay Of Proceedings" (June 27, 2004). CCAM's petition for judicial review was subsequently dismissed by the Court on October 6, 2004. *Connecticut Coalition Against Millstone v. Nuclear Regulatory Commission*, No. 04-3577-ag (2d Cir. Oct. 6, 2004).

[30] *See* "Official Transcript of Proceedings, Dominion Nuclear Connecticut, 50-336-LR, 50-423-LR, New London, Connecticut" (June 30, 2004) ("Tr.").

[31] Tr. 26. The Board later denied the stay motions *in toto*. LPB-04-15 at 3-4. CCAM's Appeal does not challenge the Board's denial of the stay motions.

conference was dedicated to oral argument and questions from the Board regarding each of CCAM's six proffered contentions. The parties were each provided time for direct and rebuttal argument and to answer questions posed by the Board during the approximately five hour conference.

On July 28, 2004, the Board ruled that CCAM's proffered contentions were all inadmissible because they failed to meet the requirements of 10 C.F.R. § 2.309.[32] As a result, the Board denied CCAM's petition for leave to intervene and request for hearing and terminated the proceeding pursuant to 10 C.F.R. § 2.309(a).[33]

On August 9, 2004, CCAM submitted its First Appeal challenging dismissal of its petition, as well as a "Motion For Reconsideration And Request For Leave To Amend Petition," advancing essentially the same arguments. By Order dated August 23, 2004, the Commission held CCAM's appeal in abeyance pending Board action on the Motion for Reconsideration. On September 20, 2004, the Licensing Board denied CCAM's Motion for Reconsideration and Request for Leave to Amend Petition.[34] CCAM's Second Appeal challenging this decision followed on September 30, 2004.

ARGUMENT

I. CCAM HAS FAILED TO IDENTIFY ANY ERRORS OF FACT OR LAW OR PROCEDURAL ERRORS BY THE BOARD THAT REQUIRE REDRESS

The Commission should affirm the Board's decisions because CCAM has failed to identify any error of law or fact or procedural error or abuse of discretion by the Board. Licensing Board rulings are affirmed where the "brief on appeal points to no error of law or abuse

[32] LPB-04-15 at 18.

[33] *Id.*

[34] LPB-04-22.

of discretion that might serve as grounds for reversal of the Board's decision." *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000). A "failure to illuminate the bases" for an exception to the Board's decision is "sufficient grounds to reject it as a basis for appeal." *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 N.R.C. 285, 297 (1994). In that decision, the Commission wrote:

> The *appellant* bears the *responsibility* of *clearly identifying* the *errors* in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims.

Id., citing General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 N.R.C. 1, 9 (1990) (emphasis added); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 N.R.C. 277, 278 (1982).

In its First Appeal, CCAM has sought to argue that there was adequate basis for the contentions it proffered -- an argument that, as discussed below, is clearly invalid. CCAM, however, has made no effort to challenge or even, in most cases, address the grounds asserted by the Board for rejecting the propounded contentions, including the Board's determination that most of the contentions were outside the scope of this proceeding and that none of the contentions specifically challenged any aspect of Dominion's License Renewal Applications. CCAM's utter failure to challenge the Board's determinations is fatal to its appeal.

In its Second Appeal, CCAM "incorporates by reference "its Motion for Reconsideration dated August 9, 2004, and all attachments thereto." Memorandum in Support of Notice of Appeal (Sept. 30, 2004) at 1. Incorporating previously filed pleading by reference does not constitute an adequate briefing of issues or identification of errors. *Texas Utilities Electric Co.* (Comanche

Peak Steam Electric Station, Units 1 and 2), CLI-93-10, 37 N.R.C. 192, 198 (1993). Moreover, CCAM again totally fails to address the Board's rulings – that CCAM had failed to comply with any of the standards applicable to motions for reconsideration or to the late amendment of contentions. CCAM claims that the Board "exalted form over substance in rejecting all of CCAM's submissions" and refers to documents and declarations provided to the Licensing Board for the first time with the motion for reconsideration. *See* Memorandum in Support of Notice of Appeal (Sept. 30, 2004). However, CCAM identifies no error in – indeed, it does not even mention – the Board's rulings that (1) it was inappropriate to present new arguments and evidence in a motion for reconsideration, (2) CCAM failed to address the standards for reconsideration, and (3) CCAM failed to address and satisfy the standards for amending contentions. LBP-04-22 at 2-7.

II. THE BOARD'S DECISION TO REJECT CCAM'S PROPOSED CONTENTIONS AND TERMINATE THE PROCEEDING IS CLEARLY CORRECT

All of CCAM's proffered contentions suffered from multiple deficiencies, any one of which would be sufficient to dismiss the contention. The Board correctly determined that the Commission's rules prohibit admission of such defective contentions and appropriately ruled that, in the absence of at least one admissible contention, the proceeding must be dismissed. 10 C.F.R. § 2.309(a).

A. Most of the Contentions Propounded by CCAM Are Outside the Scope of this Proceeding

The rules in 10 C.F.R. Part 54 are intended to make license renewal a stable and predictable process. 60 Fed. Reg. 22,461, 22,463 (May 8, 1995). To this end, the Commission has confined 10 C.F.R. Part 54 proceedings to those issues determined to be uniquely relevant to the public health and safety during the period of extended operation, leaving all other issues to be

addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope limitation is based on the principle that, with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Accordingly, the Commission has limited the scope of the safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a), which focus on the management of aging of certain systems, structures and components, and the review of time-limited aging evaluations. *See Florida Power & Light Co.,* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7-8 (2001); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 363 (2002). The Commission has stated explicitly that the scope of Commission review determines the scope of admissible contentions in a license renewal hearing. 60 Fed. Reg. at 22,482 n.2.

The regulations in 10 C.F.R. Part 51 governing license renewal are similarly intended to produce a more focused and, therefore, more effective review. 61 Fed. Reg. 28,467 (June 5, 1996); *Turkey Point*, CLI-01-17, 54 N.R.C. at 11. To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants (NUREG-1437) and made generic findings reflected in the GEIS and in Appendix B to 10 C.F.R. Part 51. Those issues that could be resolved generically for all plants are designated as Category 1 issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new and significant information). 61 Fed. Reg. at 28,468, 28,470, 28,474; *Turkey Point*, CLI-01-17, 54 N.R.C. at 12. The remaining (i.e., Category 2) issues that must be addressed in an applicant's Environmental

Report ("ER") are defined specifically in 10 C.F.R. § 51.53(c). *See generally, Turkey Point*, CLI-01-17, 54 N.R.C. at 11-12.

The Board correctly ruled that at least four of the six contentions raised in the Petition were outside the scope of a license renewal proceeding. CCAM has not challenged the rulings on the out-of-scope nature of these contentions and has therefore conceded, as it must, that they are inappropriate for litigation. It is well established that a contention is not admissible unless it is material to a matter that falls within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

1. Contention 1

Contention 1 asserted that the "routine and unplanned releases of radionuclides and toxic chemicals [from the Millstone Units] into the air, soil and water have caused death, disease, biological and genetic harm and human suffering on a vast scale." Petition at 2. The Board correctly ruled that CCAM had not shown how its allegation may be related to the detrimental effects of aging.[35] Thus, the Board correctly ruled that, among other deficiencies, Contention 1 was inadmissible because it was outside the scope of the proceeding. LBP-04-15 at 11.

On appeal, CCAM does not challenge and identifies no error in the Board's ruling that Contention 1 was unrelated to aging (i.e., that it is beyond the scope of the proceeding). All CCAM says is that "in the present relicensing proceeding, it is incumbent on the regulating authority to consider issues relative to safety in the context of current knowledge and information

[35] Even if Contention 1 were construed as an environmental issue, it would be inadmissible as beyond the scope of the proceeding, because it does not relate to any Category 2 environmental issue required to be addressed by 10 C.F.R. § 51.53(c). Radiation exposure to the public during the renewal term is a Category 1 issue determined to be small, based on a generic finding that radiation doses to the public will continue at current levels associated with normal operations. 10 C.F.R. Part 51, App. B, Table B-1. The discharge of chlorine and other biocides, the discharge of metals, the discharge of sanitary wastes and minor chemical spills, are also Category 1 issues determined to be small. *Id.; see also* GEIS § 4.4.2.2 and Table 4.4. Challenges to these generic findings are barred, absent a waiver of the NRC's

Footnote continued on next page

about the human health effects of even low doses of ionizing radiation." First Appeal at 3. This statement simply ignores the scope of the NRC's license renewal rules, which limit the focus of the safety review to aging issues, and provides no basis to reverse the Licensing Board's decision.

2. Contention 2

Contention 2 asserted, *inter alia*, that Millstone is a "primary terrorist target" and an "unprotected nuclear weapon awaiting detonation." Petition at 4. The Board correctly ruled that the "Commission has expressly determined that 'contentions related to terrorism are beyond the scope of the NRC Staff's safety review under the Atomic Energy Act and [a license renewal] proceeding.'" LBP-04-15 at 11, citing *McGuire*, CLI-02-26, 56 N.R.C. at 363. In addition, during the prehearing conference, CCAM "was unable to offer either any controlling precedent contradictory to the Commission's *McGuire* ruling or any factual basis to distinguish *McGuire* from the instant proceeding." *Id.* at 11-12.

In its appeal, CCAM identifies no error in the Board's ruling. Instead, it merely suggests that, in light of the 911 Commission Report and an alleged identification of Millstone as a "primary terrorist target" by some unnamed media reports, "the NRC should re-assess the rationale it expressed in *McGuire* in support of its disinclination to permit consideration of potential acts of terrorism in reactor licensing proceedings." First Appeal at 6. CCAM's vague reference to the 911 Commission report and unidentified media statements are irrelevant to the NRC's holding in *McGuire*. There, the NRC held:

> Terrorism contentions are, by their very nature, directly related to security and are therefore, under our rules, unrelated to "the detrimental effects of aging."

Footnote continued from previous page

rules. See Dominion's Answer to CCAM's Petition to Intervene and Request for Hearing (June 7, 2004) at 16-17.

> Consequently, they are beyond the scope of, "not material" to, and in admissible in, a license renewal proceeding.

McGuire, CLI-02-26, 56 N.R.C. at 364. CCAM offers no basis to disturb this holding.[36]

3. Contention 3

Contention 3 alleged that Dominion lacks a valid National Pollution Discharge Elimination System ("NPDES") permit. Petition at 5-6. The Board correctly determined that the status of Dominion's current NPDES permit (which remains in effect pending action by the Connecticut Department of Environmental Protection ("DEP") on a timely application for its renewal) is a matter within the sole province of the DEP, which administers the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 *et seq.*, in Connecticut, and irrelevant to and outside the scope of this proceeding.[37] LBP-04-15 at 12-13.

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[36] Even if Contention 2 were considered as an environmental contention, CCAM's argument would be irrelevant. In *McGuire*, the Commission held:

> An environmental impact statement is not the appropriate format in which to address the challenges of terrorism. We reached this conclusion for a number of interlocking reasons: (1) the likelihood and nature of postulated terrorist attack are speculative and not "proximately caused" by an NRC licensing decision, (2) this risk of a terrorist attack cannot be meaningfully determined, (3) NEPA does not require a "worst case" analysis and such an analysis would not enhance the agency's decisionmaking process, and (4) a terrorism review is incompatible with the public character of the NEPA process. Particularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate how to prevent a terrorist attack in the near term at the already licensed facilities.

McGuire, CLI-02-26, 56 N.R.C. at 365 (footnotes omitted). See also Dominion's Answer to CCAM's Petition To Intervene and Request for Hearing (June 7, 2004) at 19. CCAM's vague references to the 911 Commission Report and media accounts offers no basis to disturb this holding on the scope of NEPA review.

[37] NPDES permits are issued under section 402 of the FWPCA, 33 U.S.C. § 1342. Under section 402(b) of the FWPCA, 33 U.S.C. § 1342(b), the EPA may authorize a State to implement the NPDES permitting program for discharges within the State's jurisdiction. Connecticut is an authorized state. *See* U.S. EPA NPDES State Program Status at http://cfpub.epa.gov/npdes/statestats.cfm.

This result is compelled by the Commission's direction that licensing boards should construe their scope to avoid where possible the litigation of issues that are the primary responsibility of other agencies and whose resolution is not necessary to meet NRC's statutory responsibilities. *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121-22 (1998). On the issue raised here, "NRC licensing is in no way dependent upon the existence of a [FWPCA section] 402 permit." *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 58 (1974); *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 N.R.C. 108, 124 (1979) (citations omitted). Thus, the Board's conclusion that Contention 3 is not relevant to and outside the scope of this proceeding is clearly correct.[38]

CCAM takes no issue with the Board's ruling. Instead, on appeal, it only argues that it disputes the validity of the current NPDES permit. First Appeal at 6-7. Since this Contention is beyond the scope of the license renewal proceeding – a matter that is not contested – CCAM's assertion of a dispute is irrelevant and provides no grounds for reversal.

4. Contention 6

Contention 6 asserted that all or parts of Connecticut and Long Island "cannot as a factual matter be evacuated" in the event of a serious accident at the Millstone facility. Petition at 9. Petitioners claimed that there "is no evacuation plan in effect that will work" and that the "infrastructure surrounding Millstone" is "ineffective for this purpose." *Id.* at 10. The Board correctly followed Commission precedent holding that "emergency planning issues are outside the scope of this proceeding." LBP-04-15 at 17-18, citing *Turkey Point*, CLI-01-17, 54 N.R.C. at 9.

[38] CCAM argues that the parties are "in material dispute as to the validity of the NPDES permit." First

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In its Appeal, CCAM does not dispute that the Commission has determined that emergency planning issues are outside the scope of license renewal proceedings. Instead, it argues that the NRC regulations that establish emergency response requirements are inadequate and should be modified by, for instance, extending the evacuation zone to encompass the area within 50 miles of Millstone. First Appeal at 10. Such claims are irrelevant to whether the contention is within the scope of this proceeding (which it clearly is not.) In addition, CCAM's allegations constitute a challenge to the Commission regulations, which is impermissible under Commission regulations. *See* 10 C.F.R. § 2.335; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999).

B. None of the Contentions Alleged Deficiencies in the License Renewal Applications

A prerequisite to the admissibility of a proposed contention is that it identify the specific aspects of the application that are alleged to be deficient and provide supporting reasons for the claim that a deficiency exists. 10 C.F.R. § 2.309(f)(1)(vi).[39] However, the Petition (even as amended and supplemented by CCAM) contained only one citation to Dominion's application, and this sole citation was irrelevant to the contention.[40] This deficiency is cause enough to

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Appeal at 7. CCAM's argument is irrelevant to and does not address the jurisdictional issue.

[39] 10 C.F.R. § 2.309(f)(1)(vi) states that an admissible contention must "[p]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."

[40] The only specific reference in CCAM's petition to a portion of Dominion's application was a statement that CCAM intended to rely on two tables on severe accident mitigation alternatives ("SAMA") to establish facts relating to Contention 5. Connecticut Coalition Against Millstone Amended Petition to

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dismiss all of CCAM's contentions, but is particularly noticeable with respect to Contentions 4 and 5.

1. Contention 4

Contention 4 alleged that "operations of Millstone Units 2 and 3 have caused devastating losses to the indigenous Niantic winter flounder population" and that continued operations "will increase the severity of the environmental damage." Petition at 7. The License Renewal Applications, in the Environmental Report, provided the information required by 10 C.F.R. § 51.53(c)(3)(ii)(B) to address aquatic impacts, as the Board so established in its decision. LBP-04-15 at 14. 10 C.F.R. § 51.53(c)(3)(ii)(B) requires a license renewal applicant to provide a copy of its Clean Water Act 316(b) determination and, if necessary, 316(a) variance, or equivalent state permits and supporting documentation.[41] Dominion provided the 316(b) determination and 316(a) variance for Millstone and addressed entrainment, impingement and heat shock in sections 4.2 – 4.4 of its Environmental Report.

As the Board ruled, "Petitioner fails to identify any specific portion of either the Unit 2 or Unit 3 application with which it takes issue. . . ." LBP-04-15 at 14. The Board also ruled, "Of equal import is the fact that CCAM makes no dispute over the Licensee's compliance with 10

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Intervene and Request for Hearing (June 16, 2004) at 9. CCAM, however, could not explain how these tables related to Contention 5 (which alleged operational defects and excessive shutdowns). *See, e.g.,* Tr. 165-70. On appeal, CCAM finally reveals that its position is that a SAMA cannot be rejected on a cost-benefit basis (i.e., that any SAMA that could mitigate severe accident risk must be implemented). First Appeal at 9-10. Clearly, this assertion has nothing to do with the subject matter of Contention 5. Further, CCAM's position is simply at odds with the entire NEPA process, which weighs costs and benefits when considering mitigation of environmental impacts.

[41] A further analysis of the impacts of entrainment, impingement and heat shock is only required if an applicant cannot provide a 316(b) determination, and 316(a) variance if necessary. 10 C.F.R. § 51.53(c)(3)(ii)(B). For a discussion of the basis for this rule, see Dominion's Answer to CCAM's Petition to Intervene and Request for Hearing (June 7, 2004) at 24-26.

C.F.R. § 51.53(c)(3)(ii)(B). . . ." *Id.* Not having controverted any aspect of the License Renewal Applications, CCAM failed to define an issue for litigation in the license renewal proceeding.[42]

CCAM identifies no error in the Board's ruling on appeal. It does not dispute that Dominion included in its Environmental Report the information required by the NRC's rules, and it does not identify anywhere in the record where it provided a reference to a specific portion of the application alleged to be deficient, as required by 10 C.F.R. § 2.309(f)(1)(vi). Indeed, it admitted this during the prehearing conference.

> Judge Young: . . . Are there – do you have a specific reference to a portion of the environmental report? Am I missing –
>
> Ms. Burton: It's not specifically set out, no.

Tr. 112.

2. Contention 5

Contention 5 asserted that Millstone "Units 2 and 3 suffer technical and operational defects which preclude safe operation." Amended Petition at 8. While this Contention is on its face unrelated to aging, CCAM alleged vaguely in a supporting statement that "[s]ystem malfunctions and failures recur without adequate correction, both units "have suffered excessive occasions of unplanned emergency shutdowns," and "[b]oth units suffer from premature aging." *Id.* at 9.

CCAM provided no discussion of Dominion's application. It did not identify any aging management programs described in Dominion's applications as being deficient. It did not identify any system, structure or component evaluated in the applications as requiring further review or aging management. It did not any time-limited aging analyses in the applications as

[42] At the June 30 prehearing conference, CCAM was advised repeatedly of the need to provide specific reference to the portions of the License Renewal Applications that it challenged, and acknowledged that it had failed to do so. *See* Tr. 112, 118-120.

deficient. As the Board concluded, "Petitioner failed to cite any particular section of either application or any specific system, structure or component as being deficient." LBP-04-15 at 16.

Once more, CCAM fails to take issue with the Board's ruling. It does not show or even claim that it provided any specific reference to a portion of the application alleged to be deficient, along with the reasons for the dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi).

CCAM did argue below that an evaluation of the shutdown history of the units was required as a time-limited aging analysis ("TLAA").[43] As Dominion responded during the prehearing conference (Tr. 133-34), TLAAs that must be evaluated under 10 C.F.R. § 54.21(c) are defined as evaluations or calculations that are contained or incorporated by reference in a plant's current licensing basis. 10 C.F.R. § 54.3. Tr. 133-34. Dominion pointed out that section 4.3 of its applications does address fatigue analyses, which are TLAAs and do consider the cycles (heatup and cooldowns) that each unit experiences, and that CCAM had alleged absolutely no deficiency in that analysis. Tr. 134. In response to questions from the Board, CCAM admitted,

> Ms. Burton. Well, it may very well be that we simply aren't fully able to understand the application. The information may be here, but we - -

Tr. 148. In its decision, the Board ruled that "all of that information is contained in section 4.3 of each application, as to which Petitioner has raised not a single objection." LBP-04-15 at 16.

With respect to section 4.3 of the applications, CCAM now states for the first time on appeal that "the discussion of metal fatigue and its implications for the two reactors is closely mirrored, with no discussion of Unit 2's history of excessive unplanned shutdowns and, hence, their effect on aging." First Appeal at 9. CCAM did not allege any deficiencies in Section 4.3

[43] Connecticut Coalition Against Millstone Reply to Licensee and NRC Staff Answers to Petition (June 16, 2004) at 13.

during the prehearing conference discussions (*see* Tr. 146-50), or at any other time in the proceedings below, and it is improper to make this claim for the first time on appeal.[44] Further, CCAM's assertion still does not identify any deficiency in section 4.3, for there is simply no claim or showing that Dominion's fatigue analyses have ignored the Unit 2 cycles. Indeed, in ruling that "all of that information is contained in section 4.3, as to which Petitioner has raised not a single objection," the Board cited pages 4-14 to 4-17 of the Unit 2 application. LBP-04-15 at 16 n.70. It is thus clear that the Board actually examined section 4.3 (something CCAM has apparently still not done), and found that it explicitly discusses cycle counting and the 60-year projected transient cycles. Contention 5 was therefore properly dismissed, and CCAM offers no grounds to reverse this ruling.

C. Not One of the Contentions Had an Adequate Basis or Was Supported by Specific Facts or Expert Opinions

Even if the contentions raised in the Petition did not suffer from the fundamental deficiencies described above, they would still be inadmissible because not a single one of them was supported by an adequate basis – by facts or expert opinions, together with "references to specific sources and documents on which the requester/petitioner intends to rely," as required by the regulations. *See* 10 C.F.R. § 2.309(f)(1)(v). Indeed, the Amended Petition did not identify a single expert or a single source or document (other than an irrelevant reference to tables of SAMAs in the discussion of Contention 5[45]).

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[44] *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. __ (Aug. 17, 2004), slip op. at 16; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 N.R.C. 227, 243 (2000); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235, 260 & n. 19 (1996).

[45] *See* note 40 *supra*.

Thus, for example, with respect to Contention 1, CCAM failed to identify "any sources or supporting authority," "any specific factual basis or expert opinion to support" its assertions, and could not "give any reasons why CCAM had not provided any" such bases. LBP-04-15 at 9-10 & n.39; Tr. at 41-47. *See* Amended Petition at 2-4. The Board considered the declaration of Mr. Steinberg, a journalist, which was provided by CCAM on the eve of the prehearing conference, but found that CCAM has not provided sufficient information to establish any expertise on this part. LBP-04-15 at 10 n.39. Thus, the Board correctly concluded "Contention 1 consists of essentially bare assertions, and this is insufficient to support admission of a contention." *Id.* at 10.

CCAM's First Appeal now cites documents and sources related to Contention 1 (First Appeal at 2-4), but none of these documents was provided to the Board prior to the Board's ruling on CCAM's hearing request. Therefore, they are not properly considered on appeal[46] and provide no basis to overturn the Licensing Board's ruling.

Similarly, CCAM failed to identify a single expert, document, or other sources supporting Contention 4.[47] *See* Amended Petition at 7-8. The Board correctly held that CCAM "fail[ed] to provide any expert opinion or reference to substantiate the general allegation that the two Units at issue in this proceeding have somehow played a material role in the flounder population decline."

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[46] *See* note 44, *supra.*

[47] The Board ruled that Contentions 2 and 3 were inadmissible primarily because they were outside the scope of this proceeding. However, these contentions also lacked an adequate basis, as Dominion argued below and as the Board also suggested in its rulings. For example, Contention 2 asserted, *inter alia*, that Millstone is a "primary terrorist target" and an "unprotected nuclear weapon awaiting detonation." Petition at 4. In rejecting the contention as inadmissible, the Board noted that these allegations were made "without offering any specific supporting documentation." LPB-04-15 at 11. Contention 3 asserted that that the Millstone units lack a "valid" NPDES permit. Petition at 5-6. While rejecting the contention as out of scope, the Board noted that "the Licensee has presented record testimony of the DEP to the effect that the current permit is valid," thereby suggesting that CCAM had failed to provide adequate factual basis for its contention. LPB-04-15 at 13 (emphasis in original)

LBP-04-15 at 14. Indeed, the Board noted that CCAM failed to identify "even one specific document to support its allegations." *Id.*

On appeal, CCAM alleges that at the prehearing conference it quoted from a DEP document indicating that "[t]he adult flounder stock size in the Niantic River has already declined by 95% from 1986 (76,180 fish) to 2002 (4,124 fish)." First Appeal at 7. This statement, even if taken at face value, would only establish that a decline has occurred in the flounder population in the Niantic River, but would not indicate the existence of any impact attributable to Millstone, or any deficiency in the 316(b) determination and 316(a) variance provided by Dominion in compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B). Moreover, at the prehearing conference, CCAM neither identified nor provided this document. *See* Tr. 107. Clearly, CCAM did not establish the existence of any genuine, material dispute.

With respect to Contention 5, CCAM failed "to cite a single deficiency" resulting from the alleged "excessive" shutdowns. LBP-04-15 at 15. CCAM's sole support for its contention is the declaration of a single individual, who CCAM did not even attempt to qualify as an expert.[48] *Id.* CCAM also failed to assert "any aging-related problem." *Id.* The Board properly concluded that even if the contention could be construed as relating to the effects of aging, it was inadmissible for lack of specificity, failure to present any expert testimony or supporting documentary evidence, and failure to provide sufficient specificity regarding any alleged error or defect. *Id.* at 17. CCAM does not challenge any of these rulings. *See* First Appeal at 8-10.

[48] With respect to Contention 5, CCAM now refers on appeal to some document produced by Dominion in another proceeding, and a May 5, 2003 NRC document. First Appeal at 9. Neither of these documents was cited or provided to the Board, and therefore are not properly considered on appeal. *See* note 44 *supra*.

Finally, with respect to Contention 6 alleging that there "is no evacuation plan in effect that will work," CCAM failed to "provide sufficiently specific facts" or offer any "source or authority of any kind" in support of its assertions. LBP-04-15 at 17. CCAM does not challenge this ruling. *See* First Appeal at 10.

III. THE BOARD CORRECTLY DENIED CCAM'S MOTION FOR RECONSIDERATION AND REQUEST FOR LEAVE TO AMEND PETITION, BECAUSE NONE OF THE STANDARDS FOR SUCH REQUESTS WERE ADDRESSED OR SATISFIED

Under the NRC rules,

> Motions for reconsideration may not be filed except upon leave of the presiding officer or Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). CCAM did not seek the Licensing Board's or Commission's leave to file a motion for reconsideration, and did not show any compelling circumstances. For this reason, the Board correctly held that CCAM did not satisfy the standards for reconsideration. *See* LBP-04-22 at 3. CCAM has not challenged this ruling.

Further, a motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 N.R.C. 509, 517-18 (1984). *See also Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 N.R.C. 3, 4 (1997). The Board ruled that CCAM had provided no reason why materials submitted for the first time with the motion for reconsideration were not provided earlier, and no explanation of how these materials satisfy the standards for reconsideration. LBP-04-22 at 5. CCAM has not challenged this ruling.

Finally, under the NRC's Rules of Practice, contentions may only be amended after the initial filing with the leave of the presiding officer upon a showing (1) that the information upon which the amended contention is based was not previously available, (2) that the information upon which the amended contention is based is materially different than information previously available, and (3) that the amended contention has been submitted in a timely fashion based on the availability of the subsequent information. As the Board ruled, CCAM made no attempt to address these criteria or to show that materials submitted with CCAM's Motion for Reconsideration and Request for Leave to Amend Petition were not previously available. LBP-04-22 at 6-7. CCAM does not challenge this ruling.

In sum, CCAM does not challenge any of the Board's rulings that formed the basis for denying the Motion for Reconsideration and Request for Leave to Amend Petition. Thus, CCAM's Second Appeal is entirely without substance.

IV. CCAM HAS FLOUTED THE COMMISSION'S RULES

CCAM argues that "considerations of the public interest compel reversal of the Board's decision." First Appeal at 1. While CCAM does not state what those public interest considerations are, the public interest is in fact best served by requiring adherence to the Commission's standards for contentions. These standards are intended to assure that the hearing process is invoked only "for genuine and pertinent issues of concern . . . framed and supported concisely enough at the outset to ensure the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2,189-90. As outlined above in the Statement of the Case, CCAM has repeatedly ignored Commission rules and procedures and Board orders. Indeed, CCAM has proved itself unable to file in a timely manner a single admissible contention, despite numerous opportunities to do so.

In LBP-04-22, the Licensing Board observed:

> As the Commission has very recently re-emphasized, "[the NRC] contention admissibility and timeliness requirements 'demand a level of discipline and preparedness on the part of petitioners,' who must examine the publicly available material and set forth their claims and the support for their claims at the outset." In the instant circumstances, CCAM has failed to demonstrate even a modicum of the necessary discipline and preparedness.
>
> . . . CCAM knew about the Dominion application in February, 2004, and it was not required by the Commission to file its petition until April. As previously indicated, this provided ample time to prepare an effective petition to intervene or to provide sound legal reason why this was not done. Having done neither, CCAM cannot now be heard to complain of our earlier findings, nor of our current findings that it has complied with neither the relevant standards for reconsideration or those for amendment of its petition.

LBP-04-22 at 7 (footnote omitted). The Board also noted that

> the careless disregard of relevant standards and procedures by CCAM counsel, and the disorganized manner in which the CCAM information has been presented, ill serves the interests of CCAM's members or those of other members of the public who might have a like interest.

Id. at 7-8.[49]

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[49] This frustration was also expressed by the Board during the prehearing conference.

> [O]bviously if you're raising issues of significance and seriousness, such as those you're raising, they should be addressed in such a way that a body like this Board can address them appropriately.
>
> And without the information, you put not only the Board but the other parties in a difficult position of not being able to respond.
>
> . . .
>
> And to raise such significant concerns, and not provide the support, and then fall back on an argument that there is resistance to the issues, I think really evades the question that I'm asking you.

Tr. 44-45, 51 (Judge Young).

> The Commission's proceeding rules are quite clear about what must be provided in contentions.
>
> . . .
>
> [O]ur rules require very specific materials to be provided. They don't seem to have been provided initially. They don't seem to have been

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In short, CCAM has sought a hearing with virtually no regard for the obligations of an intervenor. It made no attempt to understand and meaningfully discuss the application, to understand the scope of this proceeding, to provide support for contentions, or to adhere to schedules. This lack of regard for its responsibilities is unfortunate, because CCAM has previously been admonished by the Commission for invoking the hearing process without making sufficient effort to become familiar with and understand the application. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 2), CLI-03-14, 58 N.R.C. 207, 220 (2003).

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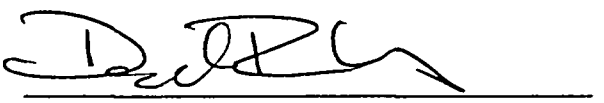
> provided in late-filed supplements. The late-filed supplement had no justification.
>
> What we're asking you is: do you have a justification for not complying with the Commission's rules and regulations?

Tr. 46-47 (Judge Abramson). CCAM had no answer to these questions.

CONCLUSION

For the reasons stated above, the Commission should affirm the Board's decisions and terminate this proceeding.

Respectfully submitted,



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Dated: October 18, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 50-336-LR
Dominion Nuclear Connecticut, Inc.	)	50-423-LR
	)	
(Millstone Nuclear Power Station, Units 2 and 3)	)	ASLBP No. 04-824-01-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut's Brief in Opposition to the Appeals of Connecticut Coalition Against Millstone," dated October 18, 2004, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 18th day of October, 2004.

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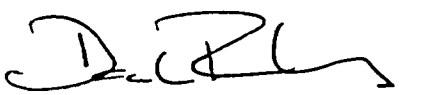

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